FILE COPY

Office Supreme Court, U.S.
FILED
MAY 4 1961
JAMES R. BROWNING, Clerk

No. 872

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

THE NAVAJO TRIBE, *et al.*

Petitioners

v.

NATIONAL LABOR RELATIONS BOARD, *et al.*

BRIEF FOR UNITED STEELWORKERS OF AMERICA IN OPPOSITION

DAVID E. FELLER
JERRY D. ANKER
FELLER, BREDHOFF & ANKER
1001 Conecticut Avenue, N. W
Washington 6, D. C.

EMIL NARICK
1500 Commonwealth Bldg.
Pittsburgh, Pa.

Attorneys for United Steelworkers of America

TABLE OF CITATIONS

Cases

	Page
Arizona ex. rel. Arizona State Board v. Hobby, 221 F. 2d 498 (D. C. Cir. 1954)	6
Elk v. Wilkins, 112 U. S. 94 (1884)	3, 6
Ex Parte Greene, 123 F. 2d 862 (2d Cir.) *cert. denied*, 316 U. S. 668 (1942)	6
FPC v. Tuscarora Indian Nation, 362 U. S. 99	6
J. R. Simplot Co., 100 N.L.R.B. 771 (1952)	9
NLRB v. Jones & Laughlin Steel Corp., 301 U. S. 1 (1937)	7
Superintendent of Five Civilized Tribes v. Commissioner, 295 U. S. 418 (1935)	6
United States v. Holliday, 3 Wall. 409 (1866)	2
United States v. 43 Gallons of Whiskey, 93 U. S. 188 (1876)	2

Statute & Treaty

National Labor Relations Act, 29 U. S. C. §§ 151-168 . . 1, 3, 5, 7-10

Treaty of 1868 with the Navajo Indian Tribe 3-6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 872

THE NAVAJO TRIBE, *et al.*,

Petitioners

v.

NATIONAL LABOR RELATIONS BOARD, *et al.*

BRIEF FOR UNITED STEELWORKERS OF AMERICA IN OPPOSITION

Unless this Court wishes to review every case in which an Indian Tribe challenges the application to it of a basic federal statute, there is no ground for certiorari in this case.

There is only one issue raised in the Navajos' petition: whether the Texas-Zinc Minerals Corporation, which operates "a uranium concentrate mill at Mexican Hat, Utah, within the Navajo Reservation and annually ships materials in excess of $5,000,000 in value from the Company's plant to the Atomic Energy Commission's receiving station in Colorado" (J.A. 108) is exempt from the provisions of the National Labor Relations Act because the plant is located on the Reservation. There is no dispute that Congress has the power to make such legislation applicable on Indian reservations, notwithstanding any state law, tribal law, or treaty to the contrary. The Tribe's sole contention is that the Act, although in terms it applies to all industries which "affect commerce," was not intended to apply to any enterprise on an Indian Reservation.

In the lower courts, the Tribe based its entire argument on the fact that there is no language in the Act expressly making it applicable to "commerce with the Indian Tribes." This argument, of course, is plainly without merit, and appears now to have been abandoned by the Tribe. Even if the commerce in this case were to be considered "commerce with the Indian Tribes"—a matter which is itself dubious since the commerce involved is between the Texas-Zinc Corporation and the Atomic Energy Commission—this would not negate the fact that it is, or at least "affects," interstate commerce as well. And while everyone would agree that the failure to cover "commerce with the Indian Tribes" exempts such commerce from the coverage of the Act when it is purely intrastate and has no impact on interstate commerce, it surely does not follow that an activity which would otherwise be subject to the Act is not covered simply because it is engaged in by an Indian, or for some other reason constitutes "commerce with the Indian Tribes." [1]

In short, Congress, by failing to cover commerce with the Indian Tribes as such, plainly did not exclude from coverage all activities which affect interstate commerce but which happen to involve Indians. We assume, for example, that even the Navajo Tribe would not argue that General Motors Corporation or United States Steel would be exempt from the Act if they were owned by Indians. Yet that would be the unavoidable consequence of holding that any activity which constitutes "commerce with the Indian Tribes" is not covered by the Act.

The Tribe has apparently now recognized the difficulties inherent in this argument, for it has not even mentioned it in its Petition for Certiorari. Rather, the Tribe now argues

---

[1] Since "Commerce with the Indian Tribes" includes any commerce with individual Indians, *e.g.*, *United States* v. *Holliday*, 3 Wall. 409 (1866); *United States* v. *43 Gallons of Whiskey*, 93 U.S. 188 (1876), it may or may not simultaneously constitute "commerce among the several states."

in this Court that the lower courts' "literal" interpretation of the Act should be reversed for the following reasons:

1. The Navajos are too "illiterate, poorly educated, unable to speak English with facility," to exercise the rights guaranteed to employees by the Act.

2. To apply the Act to the Navajos would be to abrogate the Treaty of 1868 between the United States and the Tribe.

3. Under *Elk* v. *Wilkins*, 112 U. S. 94, 99-100 (1884), "General Acts of Congress did not apply to Indians, unless so expressed as to clearly manifest an intention to include them."

We will briefly examine each of these arguments, in order to demonstrate that none of them presents any substantial questions of the kind which would justify review by this Court on certiorari.

1. The assertion that the Navajos are not sufficiently educated, literate, or otherwise equipped to exercise their rights as employees is obviously irrelevant to this case. In the first place, the Tribe does not argue that Indians are not "employees" within the meaning of the Act, but that an enterprise on an Indian Reservation—whether it employs only Indians, only non-Indians, or a combination of both—is not subject to the Act. If the Navajos are correct, Texas-Zinc would be exempt from the Act even if it employed no Indians at all.

Moreover, the question here is not whether the Board should exercise jurisdiction, but whether it has the power to do so. However, lest the Court get the impression that the United Steelworkers, or any other party to this litigation, seeks to take advantage of this already much-abused segment of our population, we would like to point out that the Navajos are not so isolated from the twentieth century as their counsel would have us believe. The record contains the affidavit of Arthur Mullett, a United Steelworkers' representative with many years of close contact with union affairs

in and around the Navajo Reservation. This affidavit shows that Navajo employees, both on and off the Reservation, have been members of labor unions and have enjoyed the benefits of collective bargaining. (J.A. 76-79). It states that all the Indian employees of the Texas-Zinc are required to know English, and it points out that many of the Indians living on the Reservation are veterans and have received the benefits of an education under the G.I. Bill.

It is probably true that the average level of education among the Navajos is below that of the nation as a whole. On the other hand, the less educated Indians are not likely to be the ones who take jobs in a complex uranium mill. All in all, we find it hard to believe that Navajos who have the ability to perform industrial work, and who vote for their own Tribal Council and for Congressmen, Senators, and Presidents, are too ignorant and uneducated to be able to exercise wisely the rights of self-organization which are guaranteed to all other industrial employees in the country.

2. The Treaty of 1868 between the Navajo Tribe and the federal Government, upon which the tribe heavily relies, also has very little bearing on the issue in this case. That treaty in no way guarantees to the Navajos an exemption from general federal law. Indeed, the very portion of the Treaty which the Tribe cites contemplates that "officers, soldiers, agents, and employees of the government" would enter the Reservation "in discharge of duties imposed by law." Thus, while the Treaty plainly conferred upon the Tribe broad powers of self-government, it did not—and probably could not—modify the Constitutional power of the federal government to enact general regulatory legislation which supersedes all contrary laws of any lesser governmental entity, be it a state, municipality, or Indian Tribe.

The Tribe is therefore forced to cast its argument very narrowly. The National Labor Relations Act should not be applied on the Reservation, it argues, because so to apply

it would "conflict with the Navajo Tribe's right to exclude outsiders under its Treaty . . ." (Pet. for Cert. 10)

The first difficulty with this argument is that the Navajos' right to exclude "outsiders" — by which it presumably means union organizers — is not directly in issue in this case. The Tribe simply assumes that if the Act is applicable on the Reservation, all Tribe rules excluding union organizers would be superseded. But the sole issue in this case is whether the NLRB has authority to conduct an election on the Reservation, and as we have seen, the Treaty expressly authorizes government officials to enter the Reservation in discharge of their duties.

But let us assume, with the Tribe, that one consequence of applying the Act in this case would be to preclude the Tribe from excluding union organizers from the Reservation. The Tribe concedes that Congress has the power to modify the Treaty by legislation, but it argues that such an unworthy intention should not be attributed to Congress in this case. If the effect of the Act were to wipe out the Treaty entirely, the argument might have some force. But the Act affects at most just one small provision of the Treaty —and only to a very limited extent. We frankly doubt that even the Tribe would sincerely consider this a significant breach of faith, despite the eloquence with which counsel expresses a sense of outrage.

Moreover, the Tribe has in effect consented to this modification of its Treaty by permitting Texas-Zinc to come on the Reservation. The Tribe is free, if it chooses, to exclude all industry, but if it wishes to become part of the national economy it can hardly complain if the laws regulating that economy are then made applicable on the Reservation.

The Navajo Tribe cannot have it both ways. It can, perhaps, keep the reservation as the agricultural society without industry it was in 1868. It can avoid the problems involved in employment relationships by preventing employment. But it cannot simultaneously waive its power to ex-

clude industry, invite it on to the Reservation, and at the same time prevent the laws which the government of the United States has established to deal with industry and industrial relations from applying on the Reservation.

But in the last analysis, the answer to the Tribe's argument based on the Treaty, as well as its argument based on the alleged "backwardness" of the Navajo people, is that the Act either applies to all Indian Reservations or to none of them. Even the Navajos do not contend that they alone are exempt. Thus, any argument which is based on factors applicable to the Navajo Tribe alone is inherently unpersuasive. The issue in this case must be resolved by examining the statute itself.

3. The Tribe ultimately falls back on the dictum in *Elk* v. *Wilkins*, 112 U.S. 94, 99-100 (1884) that general acts of Congress apply to Indians only when "so expressed as to clearly manifest an intention to include them."

But this principle, whatever its vitality may be, has certainly not precluded the application of general acts of Congress to Indians even though "Indians" are usually not specifically mentioned in such acts. E.g., *Superintendent of Five Civilized Tribes* v. *Commissioner*, 295 U.S. 418 (1935) (Income Tax Laws); *Ex Parte Greene*, 123 F. 2d 862 (2d Cir, 1941), *cert. denied*, 316 U.S. 668 (1942) (Selective Service Laws). See also *Arizona ex rel. Arizona State Board* v. *Hobby*, 221 F. 2d 498 (D.C. Cir. 1954) (Social Security Act). And while every statute must be analyzed on the basis of its own language and its own underlying purposes, the presumption that general legislation does not apply to Indians has in more recent years been replaced by the presumption stated by this Court only last year: "that general Acts of Congress apply to Indians as well as to all others in the absence of a clear expression to the contrary . . ." *FPC* v. *Tuscarora Indian Nation*, 362 U.S. 99, 120.

Moreover, there can be no question that the National

Labor Relations Act, when read in the light of its underlying objectives, manifests an intention to cover any enterprise which "affects" commerce, whether or not located on an Indian Reservation. "It is the effect upon commerce, not the source of the injury, which is the criterion," *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 32 (1937).

Section 1 of the Act, 29 U.S.C. § 151, spells out its basic purposes. This section begins with a statement of the legislative finding that interstate commerce is often impaired when employees are denied the right to organize and to bargain collectively, since the denial of these rights tends to "lead to strikes and other forms of industrial strife or unrest." It further states that the "inequality of bargaining power" between employees who do not have the freedom to organize, and employers who are often very large and highly organized, also tends to burden commerce by "depressing wage rates and the purchasing power of wage earners" and by "preventing the stabilization of competitive wage rates and working conditions within and between industries." The section then goes on to say that the free flow of commerce can be promoted by providing legal protection of "the right of employees to organize and bargain collectively," since this encourages "the friendly adjustment of industrial disputes." It also states that certain practices of labor organizations, which burden or impair commerce, should be eliminated.

The final paragraph of Section 1 reads as follows:

> "It is declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce . . . by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection."

In the light of this statement of objectives, how can the Act possibly be read as intending to exclude from its coverage industries which affect interstate commerce simply because they happen to be located on an Indian reservation? Would not the obstruction of the free flow of interstate commerce be as great if it arose as a result of industrial strife caused by the denial by an employer on a reservation of his employees' right to organize? Would not the resulting inequality of bargaining power be just as great? Is there anything in the final paragraph from which one could conclude that "the policy of the United States" there set out was not intended to apply to commerce across state lines arising on an Indian reservation? The answers to these questions, in our view, are self-evident.

Indeed, whatever doubt may possibly have been entertained on this score would certainly have been dissipated by the 1959 amendments to the Act. Appellant argues that the Navajos are not culturally ready for unions. Are they culturally ready for "blackmail" picketing and secondary boycotts? Or, to put the question in a more relevant fashion, did Congress give any indication when it passed the National Labor Relations Act in 1935, the Taft-Hartley amendments in 1947, or the Landrum-Griffin amendments in 1959, that the protections for workers, employers and the national commerce which it provided should be inapplicable where Indians were involved?

The answer plainly is that Congress at no time indicated, in any fashion, that its objectives were so limited. The Navajo labor relations policy, which the Tribe would put into effect on the Reservation in place of the federal law, illustrates the extent to which the purposes of the Act would be thwarted if the Tribe's position were upheld. The Tribal resolutions (J.A. 27, 28) would deny to employees on the Reservation precisely those rights which Congress intended to protect: the right to organize, the right to bargain collectively through freely chosen representatives, and

the right to strike and engage in other concerted activities. It would deny these rights to employees whether or not they are Indians. Apparently it is the judgment of the Navajo Tribe that the denial, rather than the protection, of these rights is the way to promote prosperity and industrial peace in industries located on the Reservation and that in this way the nation will best be assured that it will receive the uranium concentrate produced on the Reservation. But Congress has made a different judgment. It seems to us that there is no possible basis for arguing that its judgment does not apply because the uranium originates on an Indian Reservation.

The issue which the Tribe raises in this case is not new. It was settled by the Board nearly nine years ago, after consultation with the Secretary of the Interior, who has the primary responsibility for administering Indian affairs on behalf of the Government. In 1952, a union sought an election among the employees of Simplot Fertilizer Company, located on the Fort Hall Indian Reservation. The Board held, over the employer's objection, that it had jurisdiction. *J. R. Simplot Co.,* 100 N.L.R.B. 771 (1952). The Tribal authorities refused to grant the Board permission to hold the election, and the Board then inquired of the Secretary whether there was any reason in law or in policy to refrain from enforcing the Act on the Reservation.

The Secretary, after reviewing the relevant precedents, concluded that "the fact that the employer's activities are conducted on the Fort Hall Indian Reservation appears to be without legal significance so far as the scope of the Board's jurisdiction in this matter is concerned." (J.A. 55) The Secretary also stated that there was no policy reason for the Board, in its discretion, to refrain from enforcing the Act on the Reservation. "It is our view," he said, "that Indians should be able to enter into industry on a non-discriminatory basis and that having entered into industry they

should share its burdens and its benefits in the same measure as do non-Indians." (J.A. 55).

We invite the Court's attention to the full text of this exchange of correspondence, which appears at pages 48-57 of the Joint Appendix. It shows that the questions raised by the Navajo Tribe in their Petition have been fully and adequately considered and disposed of by those agencies of the Government having primary responsibility in the areas of labor relations and Indian affairs. The courts below, after reviewing the issues *de novo*, have found as a legal matter that the 1952 rulings were correct. There is no need for further review in this Court.

CONCLUSION

For the reasons above stated, the Petition for Certiorari should be denied.

Respectfully submitted,

DAVID E. FELLER
JERRY D. ANKER
FELLER, BREDHOFF & ANKER
1001 Conecticut Avenue, N. W.
Washington 6, D. C.

EMIL NARICK
1500 Commonwealth Bldg.
Pittsburgh, Pa.

Attorneys for United Steelworkers of America